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ABSTRACT

Application of the due process clause of the Fourteenth Amendment to dismissal of public employees has become clarified through such recent federal court litigation as "Loudermill v. Cleveland Board of Education" in 1981, which followed the Supreme Court precedent set in 1972 in "Board of Regents v. Roth." The threshold question in due process is whether the individual has a liberty or a property interest at stake in continued employment. Although the Court dismissed Loudermill's complaint and that of another school employee, Donnelly, the central finding is that both employees had a property interest. School boards must provide tenured and nontenured employees reasons for discharge and an opportunity to respond. Most Americans can be considered "employees-at-will," or noncertified employees who are not covered by a collective bargaining agreement and are subject to the century-old doctrine that employment for an unspecified period of time permits termination at any time. The judicial trend to protect against arbitrary termination of at-will employees such as Loudermill and Donnelly reflects society's increasing expectations of fair treatment--basically limiting the employer's right to dismiss except for "cause." Because the concept of due process is flexible, certain procedural issues remain unresolved. (CJH)

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# Due Process of Law: Loudermill v. Cleveland Board of Education

Clifford P. Hooker

In order to fully understand the implications of the *Loudermill*[1] case, it is necessary to be familiar with some basic due process concepts, going back to the Supreme Court's landmark case in 1972, *Board of Regents v. Roth*.[2] The due process clause of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The threshold question in any procedural due process case is whether an individual has a liberty or property interest at stake. The significance of *Roth* is that it established the foundation of all future due process claims by stating that a legitimate claim of entitlement must exist before due process protections apply. Property interests are not created by the Constitution. We must look to existing rules or understandings that stem from an independent source such as state law.

Roth's property interest in employment at Wisconsin State University was created and defined by the terms of his appointment. Those terms secured his interest in employment up to June 30, 1969. They specifically provided that his employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever. The Court said:

> Thus the terms of Roth's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, Roth surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.[3]

In *Perry v. Sindermann*,[4] a companion case decided by the Court the same day, the Court applied *Roth*'s principles and held that while a subjective "expectancy" of tenure is *not* protected by procedural due

1. 105 S. Ct. 1487 (1985).
2. 408 U.S. 564 (1972).
3. *Id.* at 577-78.
4. 408 U.S. 593 (1972).

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process, Sindermann's allegation that the college had a "de facto" tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to a property interest in continued employment. The Court said: "Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency."[5]

After the existence of a property interest is established, the next question is a determination of what process is due before a person can be deprived of that interest. In the 1974 case of *Arnett v. Kennedy*,[6] Wayne Kennedy was a nonprobationary federal employee in the competitive civil service in the Chicago Regional Office of the Office of Economic Opportunity. He was dismissed from his position for allegedly having made recklessly false and defamatory statements about other OEO employees. Though he was advised of his right under civil service regulations to reply to the charges, and was informed that the material on which the dismissal notice was based was available for his inspection, he did not respond to the charges. Instead, he sued in federal court, claiming that the procedures established by and under the Lloyd-La Follette Act for the removal of nonprobationary employees from the federal service deny employees procedural due process. He claimed that he was entitled to a full adversary hearing before his removal. The Lloyd-La Follette Act allowed removal "only for such cause as will promote the efficiency of the service" and required written notice of the charges and a reasonable time for a written answer and supporting affidavits. Civil service regulations enlarged the statutory provisions by requiring thirty days' advance notice before removal and entitled the employee to a post-removal evidentiary trial-type hearing at the appeal stage.

Although no consensus in reasoning emerged, a majority of the Supreme Court agreed that Kennedy was not entitled to a full evidentiary hearing before discharge. Justice Rehnquist, in his plurality opinion that was joined by Chief Justice Burger and Justice Stewart, stated: "where the grant of a substantive right is inextricably intertwined with the limitation on the procedures which are to be employed in determining that right, a litigant in the position of [Kennedy] must take the bitter with the sweet."[7] The Act does not create, and the due process clause does not require, any additional expectancy of job retention.

This plurality view in *Arnett*, however, has not been enshrined in the law. And the *Loudermill* case laid to rest this "bitter with the sweet" notion that states are free to establish whatever procedures they so choose. Justice Powell, in his forceful concurring opinion in *Arnett*

5. *Id.* at 603.
6. 416 U.S. 134, *rehearing denied*, 417 U.S. 977 (1974).
7. *Id.* at 153.

emphasized that the Lloyd-La Follett Act and the existing regulations already afforded sufficient pretermination due process.[8]

Only in the case of *Goldberg v. Kelly*,[9] in 1970, has the Supreme Court held that due process requires an evidentiary hearing before a temporary deprivation, in that case, before the termination of welfare benefits. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence, and that termination of aid pending resolution of a controversy over eligibility might deprive an eligible recipient of the very means by which to live while he waits.

## Facts in *Loudermill*

Loudermill was employed as a security guard by a private firm that supplied guards to the Cleveland Board of Education. After the private firm declared bankruptcy, Loudermill applied for a similar position with the board of education. As part of the application, Loudermill was asked, "Have you ever been convicted of a crime (felony)?" Loudermill responded "No," and signed a declaration that all of his statements were correct to the best of his knowledge, and "that I am aware that any false statements will be sufficient cause for dismissal from or refusal of an appointment for any position with the Cleveland Board of Education."

The Board accepted Loudermill's application on September 25, 1979, and he began work on that day. As a classified civil service employee under Ohio law, he could be discharged only for "cause." In the event of discharge, the statute required that the discharge order state the reasons for the discharge and that a trial board be appointed to hear any appeal within thirty days.[10]

After a year of employment, the Board of Education transferred Loudermill to a position with the newly created department of safety and security. A routine examination of his records revealed that he had been convicted of a felony twelve years previously, in 1968.

By letter dated November 3, 1980, the business manager of the board advised Loudermill that he was being dismissed. The letter explained that the discharge stemmed from his dishonesty in filling out the employment application. Loudermill claimed, that if he had been afforded an opportunity to respond to the charges before dismissal, he could have presented a meritorious defense to demonstrate his honesty. He believed that as a result of plea bargaining, he had been convicted of a misdemeanor, and not a felony.

Loudermill filed a notice of appeal with the Cleveland Civil Service Commission. The next day, the board of education adopted a resolution officially approving his discharge. Almost three months later, Loudermill appeared for a hearing before the Cleveland Civil Service Commis-

8. *Id.* at 170 (Powell, J., concurring).
9. 397 U.S. 254 (1970).
10. Ohio Rev. Code Ann. § 124.34 (1984).

sion. A referee appointed by the commission recommended that he be reinstated. Without further testimony, the civil service commission rejected the referee's recommendation and affirmed Loudermill's discharge on July 20, 1981, eight and one-half months after his discharge.

Loudermill brought suit in federal court, alleging that the board of education's failure to allow him a pretermination hearing or an opportunity to respond to the charge of dishonesty deprived him of liberty and property without due process of law. He sought damages and a declaration that the Ohio statute was constitutionally invalid for failing to provide an opportunity for classified civil service employees to respond to charges before removal.

## Donnelly's Case

Richard Donnelly was employed as a bus mechanic by the Parma, Ohio Board of Education. Like Loudermill, he was a classified civil service employee whose employment could be terminated only for cause. The board of education discharged Donnelly on August 17, 1977 because of his failure to pass an eye examination. The board previously afforded Donnelly an opportunity to retake the eye examination, but it had not provided him with an opportunity to challenge the discharge. Donnelly claimed that, if he had been afforded an opportunity to inform the board that it still employed another bus mechanic who had failed the eye examination, the board might have reevaluated the validity of the eye examination requirement and scrutinized more closely the purported reasons for discharging Donnelly, and might not have proceeded with the discharge.

After a full evidentiary hearing held nine and one-half months after his discharge, the commission ordered Donnelly reinstated, but made no provision for an award of back pay.[11] Donnelly brought suit in the Cuyahoga County Court seeking damages and back pay, but he failed to file his appeal within the fifteen-day limit prescribed by the statute.[12] The court therefore dismissed his complaint. So did the county court of appeals. And the Ohio Supreme Court denied review. Donnelly later brought suit in federal court.

The federal district court dismissed both Loudermill's and Donnelly's complaints. It held that, although Loudermill and Donnelly, under Ohio law, enjoyed a property interest in continued employment, due process did not require a pretermination hearing.

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11. The statue authorizes the commission to "affirm, disaffirm, or modify the judgment of the appointing authority." Ohio Rev. Code Ann. § 124.34 (1984). The Parma Board of Education interpreted this as authority to reinstate with or without back pay and viewed the commission's decision as a compromise. The court of appeals, however, stated that the commission lacked the power to award back pay. 721 F.2d 550, 554 n.3. As the decision of the commission is not in the record, the Supreme Court was unable to determine the reasoning behind it. 105 S. Ct. 1487, 1490 n.1.

12. Ohio Rev. Code Ann. § 119.12 (1984).

A divided panel of the Sixth Circuit Court of Appeals reversed, holding in favor of the employees.[13] The court held that the school boards' failures to give them an opportunity to present evidence challenging the proposed discharges violated their due process rights under the fourteenth amendment. The Ohio statute cannot be applied in a way that denies the rudiments of due process.

The court of appeals also addressed the employees' claims that the delays in the post-termination hearings deprived them of due process. Neither employee received a hearing within the thirty-day statutory period. In Loudermill's case, a referee did not conduct a hearing until three months after his dismissal, and the full commission did not hold a hearing until after eight months had elapsed. In Donnelly's case, a hearing was not held until nine and one-half months after his dismissal. The court determined that the state's failure to hold the hearings within the statutory time period "in and of itself did not violate [their] constitutional rights."[14] The court held that the delays were not so excessive or unreasonable as to violate due process.

## Supreme Court's Opinion

Justice White delivered the opinion of the Supreme Court, which affirmed the court of appeals in all respects.[15] The Court rejected the argument that the property right in continued employment is conditioned by the procedures specified in the statute for its deprivation. The Court laid to rest for all time the "bitter with the sweet" argument that originated in the plurality opinion in *Arnett v. Kennedy*. The Court said that this "bitter with the sweet" approach misconceives the constitutional guarantee that tenure creates:

> "While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."
> ....
> In short, once it is determined that the Due Process Clause applies, "the question remains what process is due ...." The answer to that question is not to be found in the Ohio statute.[16]

The Court then evaluated the three factors identified in *Mathews v. Eldridge*[17] to balance the competing interests at stake. In this case, these interests are the private interest in retaining employment, the

13. 721 F.2d 550 (6th Cir. 1983).
14. *Id.* at 563.
15. 105 S. Ct. 1487 (1985).
16. 105 S. Ct. at 1493 (citations omitted, quoting *Arnett v. Kennedy*, *supra* note 6, 416 U.S. at 167, Powell, J., concurring in part and concurring in result in part).
17. 424 U.S. 319 (1976).

governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of erroneous termination.

The Court noted that finding new employment takes time, and that this task is made more difficult when questionable circumstances surround the termination of the previous job. The employer has an interest in retaining a qualified employee rather than training a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than forcing its employees onto the welfare rolls. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions. Affording the employee an opportunity to respond before termination would impose neither a significant administrative burden nor an intolerable delay.

The Court noted that:

> Both [employees] had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.[18]

The Court concluded that the minimum requirements of due process for tenured public employees are oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why the proposed action should not be taken, is a fundamental due process requirement.[19]

It is important to note that *Loudermill* does not mandate a pretermination hearing, if "hearing" is assumed to mean an actual audience before a decisionmaker. An opportunity for the employee to present reasons why he should not be discharged, either in person *or in writing* is all that is required.

In a footnote the Court explained that this standard of minimal procedural safeguards rests in part on the provisions in the Ohio statute for a full post-termination hearing, stating, "the existence of the post-termination procedures is relevant to the necessary scope of pretermination procedures."[20]

The Court then addressed the claim that the delay in the post-termination administrative proceedings was sufficient to amount to a separate

18. 105 S. Ct. at 1494 (footnote and citation omitted).
19. *Id.* at 1495.
20. *Id.* at 1496 n.12.

constitutional violation. Although the statute provides for a hearing to be held within thirty days of an appeal, the Ohio courts have ruled that the time limit is not mandatory. The statute does not place any time limit for the actual decision. The Court stated: "A 9-month adjudication is not, of course, unconstitutionally lengthy per se,"[21] and held that there was no constitutional deprivation.

## Discussion

Central to the Court's ruling is the finding that Loudermill and Donnelly had a property interest in continued employment. As the Court explained in *Roth*, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it."[22]

Public employees with property interests in continued employment include: (1) employees under contract for a specified term of employment for the duration of the contract period; (2) tenured professional employees; and (3) tenured nonlicensed employees who, by statutory definition, can be dismissed only for cause. Loudermill and Donnelly, both civil service employees under the Ohio statute, came within this third category. Most tenured employees are probably already afforded more procedural protection than *Loudermill* requires.

After determining that an employee has a property interest in continued employment, school boards must provide due process before dismissal. *Loudermill* holds that a tenured public employee is entitled to an oral or written notice of the charges against him; an explanation of the employer's evidence; and an opportunity to present evidence, either in person or in writing, of why he should not be discharged.

Property interests can also be conferred by statutes such as the Veterans' Preference Law, PELRA, and many others; by collective bargaining agreements; and by *de facto* tenure policies arising from policies and practices officially promulgated by a public employer.

The term *de facto* tenure originated in the *Sindermann* case. Sindermann claimed that he and others legitimately relied upon an unusual provision that had been in the college's official faculty guide for many years, which read:

> *Teacher Tenure:* Odessa College has no tenure system. The administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[23]

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21. *Id.* at 1496.
22. 408 U.S. 564, 577 (1972).
23. *Id.* at 593, 602.

Moreover, Sindermann claimed legitimate reliance upon guidelines promulgated by the Coordinating Board of the Texas College and University System that provide that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.[24]

School boards must become sensitized to the legal implications of the words they use to avoid creating a *de facto* tenure system or other unintended property interests in continued employment. School boards should review their personnel policies, board policies, union agreements, employment application forms, any literature concerning employment, and interview procedures to determine whether any commitment has been made to nontenured employees that would support a claim of entitlement to continued employment or *de facto* tenure. If any conditions are implied, the school board should determine whether it can and should change them.

Public employees with no property interest in continued employment are *not* constitutionally entitled to procedural due process before dismissal. Probationary employees at the expiration of their employment contracts have no right to continued employment. However, in some states, courts have ruled that probationary teachers are entitled to notice of the substantive bases for their nonrenewals and an opportunity to challenge these reasons.[25] Still, in most instances, a school board can choose not to renew the contract of a probationary teacher without any requirement of notice and an opportunity to respond.

## Employment-at-Will

The remaining group of employees who have no property right to continued employment are known as at-will employees. Noncertificated personnel who are not covered by termination procedures of a collective bargaining agreement and short-term or temporary employees would be considered at-will employees.

Most Americans do not have the security of tenure contracts. Most do not even have term contracts, and can be considered employees-at-will. The traditional employment-at-will doctrine holds that when an employment contract is for an indefinite or unspecified period of time, it may be terminated at any time, at the will of either party, for any reason or for

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24. *Id.*

25. Bridger Educ. Ass'n v. Board of Trustees, Carbon County School Dist. No. 2, 678 P.2d 659 (Mont. 1984) (statement that district feels it "could find a better teacher" is insufficient to meet statutory requirement that nontenured teacher be given a reason for nonrenewal; entitled to notice that states what undesirable qualities merit a refusal to enter into a further contract); Abell v. Nash County Bd. of Educ., 71 N.C. App. 48, 321 S.E.2d 502, (1984) (state statute imposes a duty on school boards to determine the substantive bases for a superintendent's recommendation of nonrenewal of a teaching contract to assure that the nonrenewal is not for a prohibited reason; board's records should reflect the specific substantive reason for nonrenewal).

no reason at all. This century-old doctrine has long been the rule in the majority of American jurisdictions.

This traditional rule has come under increasing attack in light of modern social and economic conditions. There are two major categories of exceptions to the general rule concerning termination of employees-at-will: statutory and judicial. No employer, whether public or private, is completely free to act at his unfettered discretion in discharging employees.

Examples of federal laws that restrict an employer's right to terminate employees include Title VII, which prohibits employment discrimination based on race, color, national origin, sex or religious preference. Employees asserting rights under the Fair Labor Standards Act, the National Labor Relations Act, and the Occupational Safety & Health Act are protected against employment discrimination, as are persons age forty to seventy. Federal contractors in programs receiving federal financial assistance cannot discriminate against handicapped persons. Other federal legislation prohibits discharge of employees to prevent vesting of pension rights, for performance of jury service, or for garnishment of debt.

Numerous state statutes impose either similar restrictions or additional ones, such as good cause limitations on the right to discharge veterans and restrictions on the use of polygraph examinations.

The trend toward judicial protection against arbitrary dismissal has accelerated in the past five years. The emerging case law of wrongful discharge has produced two major exceptions to the traditional at-will rule.

There is a growing trend to prohibit the termination of at-will employees where the discharge would contravene public policy. The protection of the public policy exception extends not only to employees who refuse to violate the law but also to employees who take actions required by law. Examples include: termination after filing a workers' compensation claim; termination after refusing to participate in an illegal price fixing scheme; termination after retaining an attorney to negotiate a claim against the employer. The courts will increasingly order an employee to be reinstated with backpay and award damages when a discharge has resulted in the violation of a clearly defined public policy.

In addition to the public policy exception, some courts have also found an exception based on the existence of an implied covenant of good faith in employment contracts. In these cases, courts have found an implied promise of the employer that it would not act arbitrarily in dealing with its employees, basically limiting the employer's right to dismiss except for "cause." The courts look to such facts as the length of the employee's service, the lack of any direct criticism of his work, and any assurances he received that his work was satisfactory.

The concept of employment-at-will concerns employees who have no property right to continued employment. However, the distinction between tenured and non-tenured personnel is irrelevant if school boards

are willing to offer the *Loudermill* protections to all employees. It is really a very livable standard. We are becoming a society that expects employers, in fairness, to inform all employees of the reasons why they are being discharged, and provide them with an opportunity to respond. Nothing more elaborate is required by *Loudermill*.

## Unresolved Issues

Justice Brennan, in his partial concurring opinion, limited the Court's holding to employees who did not dispute the facts offered to support their discharges, but who had "plausible arguments to make that might have prevented their discharge."[26] Both Justices Brennan and Marshall would hold that due process would require more than the *Loudermill* "opportunity to respond" when there are "substantial disputes in testimonial evidence."[27] It remains uncertain what procedures will satisfy constitutional requirements when serious factual disputes exist or when an opportunity for a full post-termination hearing is lacking.

The Court stated: "the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[28] With this minimal guidance from the Court, one cannot help but agree with Justice Rehnquist, who, as the sole dissenting vote, accused the majority of failing to provide useful standards and predicted future pretermination due process cases to resolve these issues.[29] But that is the nature of the flexible concept of due process, which depends on the facts in each case to determine what process is due.

26. 105 S. Ct. at 1494.
27. *Id.* at 1499.
28. *Id.* at 1495.
29. *Id.* at 1504.